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No. 86-1608

In the Supreme Court of the United States

OCTOBER TERM, 1986

IVAN BULJUBASIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

19pp

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because a co-defendant's motion for severance was not granted until late in the trial.

2. Whether the district court properly permitted evidence and closing argument regarding petitioner's failure to report an alleged extortion attempt to law enforcement authorities.

3. Whether the district court properly refused to grant immunity to a prospective defense witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 808 F.2d 1260.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1987. A suggestion for rehearing en banc was denied on February 2, 1987 (Pet. App. 16). The petition for a writ of certiorari was filed on April 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] The court of appeals determined that petitioner's en banc request, which was captioned "Petition for Rehearing En Banc," constituted "a suggestion of rehearing en banc (without a petition for rehearing)" (Pet. App. 16). The petition for a writ of certiorari would therefore appear to be out of time under Rule 20 of the Rules of this Court.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to commit mail fraud and to destroy a building by fire or explosive, in violation of 18 U.S.C. 371; on three counts of attempting to destroy a building by fire or explosive, in violation of 18 U.S.C. 844(i); and on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three concurrent ten-year terms of imprisonment on the explosive violations, to be followed by a two-year term of imprisonment on one of the mail fraud counts. He was also placed on probation for five years and was ordered to pay a total of $41,000 in fines and $4,200 in restitution to a victim of the offense.

1. The evidence at trial showed that petitioner acquired a Chicago apartment building through Slobodan Pavlovic, the owner of a real estate company. Through the assistance of Ilija Zabic, petitioner hired Ivan Siprak and Robert Samuelson to set fire to the building. Petitioner instructed Pavlovic to pay Zabic, Siprak, and Samuelson once the arson was completed. Samuelson set the building on fire, Pavlovic paid $9,000 to Zabic and Siprak, and petitioner filed insurance claims for the resulting damage. The police eventually apprehended all of the participants in the scheme. Pet. App. 1-2.

2. Petitioner and Pavlovic were indicted together and their cases were joined for trial. See Fed. R. Crim. P. 8(b).[2] On November 6, 1985 (13 months after indictment and 12 days before trial), Pavlovic moved for a severance on the ground that he and petitioner expected to maintain inconsistent defenses. The district court determined that

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[2] Prior to petitioner's trial, Zabic was convicted of arson and Samuelson and Siprak pleaded guilty to the charge of attempted arson.

Pavlovic had failed to show that his defense would conflict with petitioner's. The court therefore denied the severance motion. Pet. App. 2-4.

On November 18, 1985, Pavlovic renewed his severance motion, suggesting to the court for the first time that he would allege that petitioner coerced him, through threats of violence, to pay Zabic and Siprak for their efforts in connection with the arson. The court indicated that a severance would be necessary in the event that Pavlovic offered evidence of compulsion, but in light of Pavlovic's refusal to commit himself to a compulsion defense at that point, the court denied the severance motion pending further developments. In the meantime, in order to avoid any prejudice to petitioner, the court instructed Pavlovic to avoid any reference to his defense of compulsion in the presence of the jury until it became clear that he would provide evidence supporting that theory. Pet. App. 5-6.

After two weeks of trial, Pavlovic stated to the court under oath, outside the jury's presence, that he would testify that petitioner coerced him into engaging in the arson scheme. At that point, the court determined that a severance was warranted; the court therefore declared a mistrial with respect to Pavlovic and proceeded with the trial against petitioner alone. The prosecutor then granted Pavlovic use immunity under 18 U.S.C. 6003, and Pavlovic testified that petitioner instructed him to pay Zabic for the arson. The jury convicted petitioner, and Pavlovic's case was set for a new trial. Pet. App. 7.

The court of appeals affirmed petitioner's conviction. It found that it was proper for the district court to grant the severance when it did and that, in light of the protective measures ordered by the district court, conducting a joint trial up to the time of the severance did not prejudice petitioner. The court also found that there was no merit to petitioner's claims regarding the admission of certain

evidence at trial and regarding the government's refusal to grant immunity to a proposed defense witness who refused to testify at trial. Pet. App. 7-15.

ARGUMENT

1. Petitioner contends (Pet. 19) that the court of appeals' standard "for determining the degree and nature of antagonistic defense which requires a severance" conflicts with the standard employed by the Fifth Circuit. That contention is incorrect.

The court of appeals stated that a severance is not required "[u]nless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants" (Pet. App. 5 (emphasis in original)). The Fifth Circuit applies a virtually identical standard, stating that "severance is required only when the defense of one party, if believed, necessarily indicates the guilt of the other. In other words, the defenses must be 'more than merely antagonistic—they must be antagonistic to the point of being mutually exclusive.' " *United States* v. *Holcomb*, 797 F.2d 1320, 1324 (1986) (citations omitted). See also *United States* v. *Fortna*, 796 F.2d 724, 738 n.13 (5th Cir. 1986), cert. denied, No. 86-587 (Nov. 10, 1986); *United States* v. *Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986). Thus, there is no conflict between the Seventh Circuit and Fifth Circuit standards.[3]

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[3] Petitioner's statement that "the Fifth Circuit standard does not require that the antagonism be mutually exclusive" (Pet. 20) is plainly incorrect. In *United States* v. *Romanello*, 726 F.2d 173 (1984), the one Fifth Circuit case on which petitioner relies (Pet. 20-23), that court embraced precisely that standard. See 726 F.2d at 177 ("To compel severance the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive.").

Petitioner also contends that the decision of the Seventh Circuit conflicts with decisions of several state courts with regard to the proper standard to apply in determining whether a severance should be granted based on a claim of antagonistic defenses. In the first place, the question whether a severance should be granted in a particular setting is ordinarily a matter of non-constitutional criminal procedure on which the states are free to adopt rules at variance with the rules applied in the federal system. A difference in approach between state and federal courts on such an issue should therefore be no source of concern to this Court. Beyond that, however, we discern no conflict between the decison in this case and the four state court decisions cited by petitioner. Two of those state court decisions expressly adopted a standard indistinguishable from the one applied by the court in this case. See *Commonwealth* v. *Moran*, 387 Mass. 644, 659, 442 N.E.2d 399, 408 (1982) (severance granted when defenses were "mutually antagonistic and irreconcilable"); *State* v. *Clarke*, 448 A.2d 1208 (R.I. 1982) (severance granted "if [the] conflict between [the] defenses is real and substantial and of such an irreconcilable nature that it is likely [the] jury will infer guilt on [the] basis of [the] conflict alone"). The other two state court decisions use more general language, but do not employ a standard that is discernibly different from the one employed by the Seventh Circuit. See *People* v. *Byron*, 116 Ill. 2d 81, 506 N.E.2d 1247 (1987) ("Severance is required where the defenses of codefendants are so antagonistic that severance is imperative to insure a fair trial."); *State* v. *Webb*, 424 So.2d 233 (La. 1982) (severance required when one defendant "intends to lay blame for the offense at the feet of [the] codefendant").

In any event, a severance was granted in this case as soon as it became clear that Pavlovic's defense would conflict with petitioner's. Petitioner argues (Pet. 23-31) that he was prejudiced by the district court's decision to

postpone granting a severance until it became clear that Pavlovic would present a conflicting defense. As the court of appeals' analysis shows, however, there is no merit to that claim.

This Court has recognized that society has a strong interest in prosecuting criminal cases through joint trials. *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 9-10; *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 10. Once it is established that joinder is proper—as it plainly was here—trial courts exercise substantial discretion in determining whether a joint trial is appropriate in a particular case. See Fed. R. Crim. P. 14; *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Watkins*, 811 F.2d 1408, 1410 (11th Cir. 1987); *United States* v. *DiPasquale*, 740 F.2d 1282, 1293 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985). The trial court acted properly here in continuing with the joint trial until it became clear that a severance would be necessary.

Throughout the period that the joint trial continued, the district court took steps to protect petitioner from undue prejudice, while at the same time properly refusing to grant a severance based solely on Pavlovic's unsupported representation that the defenses would conflict. As the court of appeals observed (Pet. App. 4), during the four years prior to the trial, both petitioner and Pavlovic "affected absolute ignorance of the events." Even as of the time of Pavlovic's severance motion on November 14, 1985, Pavlovic's position seemed to be that he made a payment to Zabic at petitioner's request, but that he did not know the purpose of the payment—a defense that was not at all irreconcilable with petitioner's defense of complete ignorance of the arson (see *ibid.*).

It was not until November 18 that Pavlovic first suggested that he would raise a defense of compulsion and that in support of that defense he would offer evidence that petitioner had a reputation as a dangerous person

who carried firearms (Pet. App. 5). In light of the belated nature of Pavlovic's claim, the district court justifiably expressed skepticism that Pavlovic's proposed defense would be supported by any evidence. The court's skepticism was especially justified because, even after November 18, petitioner's counsel refused to commit himself to a coercion defense. *Id.* at 6. Because it was not yet clear, even from Pavlovic's counsel, whether Pavlovic would ultimately choose to rely on that defense, the district court properly refused to grant a severance at that time. Instead, the court took steps to avoid any possible prejudice to petitioner by forbidding Pavlovic from making any reference to petitioner's reputation, his practice of carrying firearms, or his conduct in coercing Pavlovic to participate in the offense, until it became clear that Pavlovic would testify or offer some other evidence to support his defense of compulsion. *Id.* at 6-7.

Not until December 6, 1985, two weeks into the trial, did Pavlovic commit himself to relying on the defense of compulsion. At that point Pavlovic made his sworn statement outside the presence of the jury in which he claimed that petitioner forced him to make an arson payment to Zabic. Based on that statement, the district court granted a severance.

For the district court to have granted a severance any earlier would have been improvident. To grant a severance on the basis of a defendant's representation that he might raise a defense that would be inconsistent with some other defendant's defense would invite manipulation and result in a large number of unjustified severances. Rather than granting a severance that might well have turned out to be unnecessary, the district court wisely delayed granting the severance but in the interim took steps to avoid any prejudice from the potential conflict between the positions of the two defendants. As the court of appeals noted, the district court "kept out all evidence that would have un-

fairly prejudiced [petitioner] and even prevented Pavlovic's counsel from intimating that [petitioner] may have coerced Pavlovic into cooperating" (Pet. App. 11).

Although petitioner contends that he was prejudiced by the joint trial prior to the time the severance was granted, he does not make a convincing showing to support his claim. His principal complaint is that Pavlovic's attorney conducted a searing cross-examination of petitioner that was far more effective than the cross-examination conducted by the government (Pet. 24-29). In fact, although Pavlovic's counsel cross-examined petitioner in a sarcastic manner (Pet. App. 12), that was hardly enough to establish conflicting defenses or to prejudice petitioner irreparably in the eyes of the jurors. As the court of appeals noted, Pavlovic's lawyer was sarcastic with other witnesses too, and his "sarcasm did not add to the evidence already in the lists against petitioner" (*ibid.*).

Petitioner also complains (Pet. 15-16) of other respects in which Pavlovic's counsel buttressed the government's case against petitioner. In each of those instances, however, Pavlovic's counsel was simply underscoring the evidence against petitioner in order to minimize his own client's role in the offense, a tactic that is not unusual in joint trials and that does not rise to the level of mutually exclusive or irreconcilable defenses that require a severance. See *United States* v. *Paradis*, 802 F.2d 553, 561-562 (1st Cir. 1986); *United States* v. *DeLuna*, 763 F.2d 897, 921 (8th Cir.), cert. denied, 474 U.S. 980 (1985); *United States* v. *Hendrix*, 752 F.2d 1226, 1232 (7th Cir.), cert. denied, 471 U.S. 1021 (1985); *United States* v. *Becker*, 585 F.2d 703, 707 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Ehrlichman*, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Barber*, 442 F.2d 517, 530 (3d Cir.), cert. denied, 404 U.S. 958 (1971).

Finally, as the court of appeals noted, the case against petitioner was quite strong.[4] Accordingly, any prejudice petitioner might have suffered from Pavlovic's cross-examination of him or of any of the government's witnesses could not have affected the outcome of the trial, and thus was not sufficient to render the district court's handling of the severance requests an abuse of discretion.

2. Petitioner next contends (Pet. 32-39) that the government improperly impeached his trial testimony. Petitioner testified that, two years after the arson, Zabic attempted to extort money from him (Pet. App. 13). On cross-examination, petitioner admitted that he had failed to notify the police of the extortion attempt. He explained his failure to do so on the ground that he was a suspect in the arson investigation and he expected that the police would not believe him (*ibid.*).

This Court has held that the Due Process Clause prohibits the government from administering *Miranda* warnings and then using the defendant's post-arrest silence to impeach the defendant's exculpatory testimony at trial. *Doyle* v. *Ohio*, 426 U.S. 610 (1976). But the principles of *Doyle* cannot be extended to a case such as this one, where a defendant claims to have been a victim of a separate, subsequent crime, and the government seeks to impeach that claim by showing that the defendant failed to report the alleged crime against him. A defendant who has once been given *Miranda* warnings in connection with a police interview is not thereafter forever immunized from impeachment by his silence in connection with a wholly separate matter.

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[4] In addition to the direct evidence given by Zabic, Pavlovic, and Samuelson, there was corroborative testimony from two other witnesses. Moreover, the dilapidated condition of the building, the obtaining of insurance for substantially more than the value of the building, and petitioner's efforts to remove all the tenants from the building before the arson provided strong circumstantial support for the direct evidence of petitioner's guilt (see Pet. App. 11).

Petitioner's failure to report the alleged extortion attempt logically supports the inference that the extortion did not take place, and there is nothing unfair about allowing the government to ask the jury to draw that inference. In addition to the fact that the alleged extortion by Zabic was an entirely separate crime from the arson, it was a crime in which petitioner claimed to be the *victim*. Moreover, petitioner was last given *Miranda* warnings more than a year before the extortion supposedly took place, and even at that time petitioner had not invoked his right to remain silent, but had freely discussed the arson allegations with the police (Pet. App. 13).[5]

Petitioner makes the related contention that it was improper for the district court to bar him from testifying that the reason he did not report the Zabic extortion in 1983 was that he was relying on the *Miranda* warnings he received in 1981 and 1982. As the court of appeals noted (Pet. App. 14), the district court properly barred petitioner from giving that explanation because the apparent purpose of offering that testimony was to evoke sympathy by offering into evidence an ethnic slur from a police officer that had accompanied one of the *Miranda* warnings petitioner had received. In any event, even if the district court was incorrect in barring the evidence regarding the *Miranda* warnings, the error was inconsequential, since petitioner was permitted to explain that the reason he did not report Zabic's extortion attempt was that he had been told as early as 1981 that he was a suspect in the arson investigation (see Tr. 2314). Thus, petitioner was able to give essentially the same explanation for his conduct that he would have given if he had been permitted to refer expressly to the *Miranda* warnings: that he did not tell the

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[5] Because petitioner did not invoke his right to remain silent, but instead spoke freely with the police, this case is more akin to *Anderson* v. *Charles*, 447 U.S. 404 (1980), than to *Doyle*.

police about the extortion attempt because, still being a suspect in the arson investigation, he did not think the police would believe him. In light of the collateral nature of the inquiry into the extortion matter and the limited scope of the district court's restriction on petitioner's testimony, petitioner could not have been prejudiced by the district court's order barring reference to the *Miranda* warnings.

3. Finally, petitioner contends (Pet. 39-41) that the trial court should have granted use immunity to Ivan Siprak after Siprak invoked his privilege against compulsory self-incrimination and declined to testify as a defense witness.

A United States Attorney may request an order for witness immunity when "the testimony * * * from such individual may be necessary to the public interest" and the witness has refused to testify on the basis of his privilege against compulsory self-incrimination. 18 U.S.C. 6003. This Court has never recognized the existence of judicial authority to immunize defense witnesses absent a request from the government. Rather, the Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). See also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984) ("Congress expressly left this decision exclusively to the Justice Department."). Following these principles, the courts of appeals have overwhelmingly ruled that judges may not immunize defense witnesses without a request from the prosecution.[6]

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[6] See, *e.g.*, *United States* v. *Whittington*, 783 F.2d 1210, 1219-1220, on reh'g, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974

Prior to this Court's decisions in *Doe* and *Conboy*, the Third Circuit held that a district court may immunize a defense witness when that witness has essential, exculpatory information that is unavailable from other sources. See *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "both clearly exculpatory and essential to the defendant's case" (*id.* at 972). In addition, "[i]mmunity will denied if the proffered testimony is found to be * * * cumulative" (*ibid.*). The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (1981) (emphasis in original). See also *United States* v. *Steele*, 685 F.2d 793, 808 (3d Cir.), cert. denied, 459 U.S. 908 (1982).[7]

(Oct. 14, 1986); *United States* v. *Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Mendia*, 731 F.2d 1412, 1414-1415 (9th Cir.), cert. denied, 469 U.S. 1035 (1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984); *United States* v. *Bounos*, 693 F.2d 38, 39 (7th Cir. 1982); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1336 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976).

[7] The Third Circuit has also held that the Due Process Clause may require a grant of use immunity to a defense witness if the prosecutor, through selective use of immunity, has deliberately distorted the judicial fact-finding process. *United States* v. *Bazzano*, 712 F.2d 826, 839-840 (1983) (en banc), cert. denied, 465 U.S. 1078 (1984); *United States* v. *Lowell*, 649 F.2d 950, 964-965 (1981); see also *United States* v. *D'Antonio*, 801 F.2d 979, 982-983 (7th Cir. 1986). As the court of

Although the Third Circuit's approach to the issue is different from that of other circuits, there is no need for the Court to address that difference in this case. First, the Third Circuit has yet to determine whether its recognition of judicial immunity survives this Court's remarks in *Doe* and *Conboy*. In light of those intervening decisions, the Third Circuit may reconsider its analysis of the issue of defense witness immunity. Second, petitioner has not demonstrated that he would have obtained a favorable ruling on his request to immunize Siprak even in the Third Circuit, because petitioner failed to show that if Siprak were immunized, he would give testimony that clearly exculpated petitioner.

Contrary to petitioner's assertion, the record does not reflect that Siprak's testimony would have been helpful to petitioner. At trial petitioner predicted that Siprak would testify that petitioner was not present on one occasion when Siprak and Zabic went to Pavlovic's office to collect money for the arson from Pavlovic. That prediction was based on two statements Siprak had previously made to investigators. The statements, however, were inconsistent with one another in important respects. In addition, the statements were inconsistent with the accounts of that meeting given by both Zabic and Pavlovic at trial, and the statements were made in the course of an account by Siprak that was apparently designed to minimize his culpability in the arson scheme. See Gov't C.A. Br. 43-46. Moreover, other portions of Siprak's prior statements were damaging to petitioner, and testimony from him on those subjects would not have been helpful to petitioner's defense. For example, in one of his pretrial statements, Siprak said that he had overheard Zabic talking with Pavlovic about getting money from petitioner, and in

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appeals noted (Pet. App. 15), in this case all the significant participants in the arson scheme other than Ivan Siprak testified at trial. There was therefore "nothing lopsided about the presentation of evidence here" (*ibid.*).

another statement, Siprak said that Zabic had told him Pavlovic was holding funds to be paid to Zabic at petitioner's direction. See *id.* at 43-45. Accordingly, far from providing clearly exculpatory evidence, the effect of immunizing Siprak, in all likelihood, would have been to strengthen the case against petitioner. In these circumstances, it was not error for the district court to decline to compel the government to seek an order of immunity for Siprak so that he could be forced to testify as a defense witness at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

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